IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION SUIT NO. 3489 OF 1987

The Hindustan Construction Co. Ltd., a Company registered under the Companies Act, 1913 and having its registered office at Construction House Walchand Hirachand Marg, Ballard Estate Bombay - 400 038. .. Plaintiffs

Versus

1. The Union of India through The Executive Engineer (S&C), Vasai Creek Bridges, Western Railway, 8th floor, Churchgate Building, Churchgate, Bombay - 400 020.

2. General Manager, Western Railway, having its office at Churchgate, Bombay - 400 020. .. Defendants

Mr. Milind Vasudeo i/b M/s. Harish Joshi & Co. for the plaintiffs.

Mr. Suresh Kumar for the defendants.

CORAM: R.M. LODHA, &
S.A. BOBDE, JJ.

DATED: 14TH DECEMBER, 2006

JUDGMENT. : [Per R.M. Lodha, J.]

. This Arbitration Suit has been referred to the Division Bench in view of the order dated 19th April, 1988, passed by the learned single Judge.

2. The Reference order dated 19th April, 1988, reads thus:

" CORAM: S.N. VARIAVA, J.
Date : 19th April 1988.

ORAL ORDER :

. This Petition is under Section 20 of the Arbitration Act.

. The facts briefly stated are that on 24th April, 1984, the Plaintiffs submitted their tender to the Defendants. The contract between the parties was arrived at on 7th February 1985. Clause 13.6 of the Contract provides as under:-

> '13.6. The contract shall be governed by the General price variations clause as under:
>
> Adjustment for variation in prices of materials labour and fuel shall be determined in the manner prescribed below:-
>
> The Percentage component of various items in this contract on which variation in price admissible shall be:-
>
> | | |
> |---|---|
> | Material component | 30% |
> | Labour component | 30% |
> | Fuel component | 5% |
> | Fixed component at | 35% shall not be considered for any price variation.' |

. If, in any case, the accepted offer includes some specific payment to be made to consultants or some materials supplied by Railway at fixed rate, such payments shall be excluded from the gross value of the work for purpose of payment/recovery of variations.

The amount of variation in prices in the several components (labour, materials, etc.) shall be worked out by the following formulae:-

i) $L - \frac{R \times (I - 10)}{10} \times \frac{P}{100}$

ii) $M - \frac{R \times (W - Wo)}{Wo} \times \frac{Q}{100}$

iii) $U - \frac{R \times (F - fo)}{Fo} \times \frac{Z}{100}$

. It would seem that thereafter the State Government revised the minimum wages payable to the Unskilled Labour. According to the Plaintiffs as a result of this revision the additional burden imposed upon the Plaintiffs was only partly compensated by the formula given under the above stated Clause 13.6. The Plaintiffs claim that they are entitled to be compensated for the increase in the cost of labour and they have accordingly made an additional claim. The Defendants, on the other hand, contend that in fact no dispute has arisen out of the conditions of the Contract. According to them, the claim of the Plaintiffs is outside the terms of the Contract and that the only compensation and the escalation to which the Plaintiffs are entitled to as per Clause 13.6 have admittedly been received by the Plaintiffs.

. The question therefore which arises is whether there is any dispute or difference arising out of the Contract which would necessitate as reference. My prima facie view was that there was no dispute arising out of the Contract which would necessitate a reference. However Mr. Madon has drawn my attention to two unreported judgements of this Court both dated 7th January 1988 passed in Arbitration Suits No.1499 of 1985 and 1327 of 1985 wherein the Learned Judge while construing an identical arbitration clause has held that the question whether the claim is in excess of what is prescribed under the Contract, is within the cognizance of the Arbitrator and that a reference cannot be

> refused on the ground that some of the claims are in excess of what is provided under the Contract.
>
> . As against this Mr. Lokur has cited an unreported judgment of this Court dated 20th January 1988 in Arbitration Suit No.454 of 1979 whereunder the Learned Judge has held that where a Clause of the Contract barred the claim for excalation then in view of the specific Agreement between the parties it was not open for the Plaintiffs to claim additional amounts on grounds of excalation and, that a claim on this account falls outside the ambit of the agreements between the parties and that it was not possible to refer such disputes to Arbitration.
>
> . Both the abovementioned Judgments which are binding on me are directly contrary to each other. Under these circumstances, it is necessary that this question be decided by a Division Bench to this Court.
>
> . Under the circumstances, I direct that the matter be placed before the Learned Chief Justice for the purposes of assigning the Suit to a Division Bench for consideration of the question as to whether claims which arise dehors the Contract and/or which are contrary to the express provisions of the Contract can be referred to Arbitration under the terms of the Contract."

3. The necessity of reference seems to have arisen as the learned single Judge found that there was difference of opinion by the two single Judges of this Court on the question whether there is any dispute or difference arising out of the contract which would necessitate the reference.

4. In the Plaint filed under Section 20 of the

Arbitration Act, 1940, the plaintiffs set out the following questions indicating the disputes and differences having arisen between the parties on the interpretation of the contract:

> "(i) Whether the Plaintiffs are entitled to payment on account of increase in Minimum Wages during execution of the works as per their letter No.HC/BCRB/1064 dated 25.12.1985 and subsequent letters, amounting to Rs.86,30,300.00 for the period ending September, 1987.
>
> (ii) Whether the Plaintiffs are entitled to payment on account of increase in Minimum Wages for the period beyond September 1987 till completion of the work, on similar basis.
>
> (iii) Whether the Plaintiffs are entitled for payment of interest including past, pendente lite and future interest on the amounts found due to them.
>
> (iv) Whether the Plaintiffs are entitled for costs of reference.

5. The principal dispute or difference that seems to have arisen is regarding increase in minimum wages during the execution of the contract work. According to the plaintiffs, they are entitled to payment on account of increase in minimum wages during execution of the work.

6. The case of the plaintiffs is that they entered into contract with the defendants for

construction of railway bridge No.73 near Vasai. The defendants accepted the tender of the plaintiffs on 24th April, 1984 and the formal contract was executed on 7th February, 1985. The work under the contract was to be completed in thirty months i.e. by 23rd October, 1986. The estimated value of the work was Rs.5,13,88,500/-. According to the plaintiffs, the tender rates were predicted upon the cost of labour, material etc. as prevailing at the time of submission of the tender; the contract itself provided for price escalation clause and formulae for quantifying the escalation in price payable to the Plaintiffs. During the execution of the work, the State Government revised the minimum wages rates of the unskilled labour. The plaintiffs' case is that the revision is very much in excess of rise in the cost of living index. They started paying to their workers the revised minimum wages as applicable from time to time. The additional burden due to the said revision was only partly compensated by the formula which was based on the cost of living index. The contract provided that the plaintiffs would have to pay the minimum wages as per the Minimum Wages Act. This fact coupled with the agreement that the plaintiffs were to be compensated for increase in the cost of labour made it necessary for the defendants to reimburse the additional cost to the plaintiffs. The plaintiffs claim to have written to the

defendants that they must pay to the plaintiffs on the basis of the revised minimum wages in respect of the agreed component of labour in the contract but despite repeated requests when the defendants failed to pay as per the demand of the plaintiffs, they were constrained to file the Arbitration Suit under Section 20 of the Arbitration Act, 1940.

7. Clause 13.6 of the contract has already been noticed by the learned single Judge in the referral order which we have reproduced above.

8. The counsel for the plaintiffs relied upon clause 54 of the General Conditions of the contract which reads thus:

> "54. The contractor shall be responsible for compliance with the provisions of the Minimum Wages Act, 1948 (hereinafter referred to as the "said Act") and the Rules made thereunder in respect of any employees directly or through petty contractors or sub-contractors, as per C.S. No.36 dt. 20.3.67, employed by him on road construction or in building operations or in stone breaking or stone crushing for the purpose of carrying out this contract.
>
> . If in compliance with the terms of the contract, the contractor directly or through petty contractors or sub-contractors supplies any labour to be used wholly or partly under the direct orders and control of the Railways whether in connection with any work being

executed by the Contractor or otherwise for the purposes of the Railway such labour shall, for the purpose of this clause, still be deemed to be persons employed by the contractor.

. If any moneys shall, as a result of any claim or application made under the said Act be directed to be paid by the Railway, such moneys shall be deemed to be moneys payable to the Railway by the Contractor and on failure by the Contractors to repay the Railway any moneys paid by it demanded, the Railway shall be entitled to recover the same from any moneys due or accruing to the contractor under this or any other Contract with the Railways."

9. The counsel for the plaintiffs also relied upon clause 13.7 as well as additional special condition - Clause 9. These clauses read thus:

"13.7 <u>Price adjustment during the extended period of completion.</u>

The price adjustment i.e. either increase or decrease will be applicable upto the stipulated date of completion where such expansion has been granted under Clause 17.3 of the General Conditions of Contract. However, where extension has been granted under Clause 17.4 of General Conditions of Contract the price adjustment will be done as follows:-

In case the indices increase above the indice applicable to the last month of the original completion period or the extended period under Clause 17.3, the price adjustment for the period of extension granted under Clause 17.4 will be limited to the amount payable as per the indices applicable to the last month of the original completion period or the extended period under

Clause 17.3 of the General Conditions of the Contract.

In case any or all the indices fall below the indices applicable to the last month of the original extended period of completion under Clause 17.3, then the lower indices will be adopted for the price adjustment for the period of extension under Clause 17.4 of the General Conditions of Contract."

.....

9. Price variation due to escalation: The adjustment for variation in price of material, labour and fuel will be governed by Clause 13.6 of the additional special conditions of works. However, the index for labour component will be the consumer Price Index No. for industrial workers for "Bombay Centre" and not that of "All India". To this extent the Clause 13.6 of additional special conditions of works will stand modified."

10. On the other hand, the counsel for the defendants invited our attention to the letter dated December 25, 1985 (Exhibit-B) annexed with the Plaint and the decision of the Deputy Chief Engineer dated 19th May, 1986 (Exhibit-L) declining to make extra payment towards variation of price of labour excepting as provided for in Clause 13.6. He submitted that in the backdrop of these documents, if Clause 63 of the General Conditions is seen, it would be apparent that the dispute sought to be raised by the plaintiffs falls in the category of ‘excepted matters’ and, therefore,

cannot be referred for adjudication to the Arbitrator. In this connection, the counsel for the defendants relied upon the judgment of the Supreme Court in the case of **General Manager, Northern Railway & Anr. Vs. Sarvesh Chopra, (2002) 4 SCC 45.**

11. Clause 13.6 provides that the contract shall be governed by the general price variation clause as set out therein. *Inter alia,* this clause provides for variation in price admissible to labour component at 30%. The parties are ad-idem that as per Clause 13.6 the price variation concerning labour has been paid to the contractor (plaintiffs). The plaintiffs' claim pertains to the revision of minimum wages made by the State Government payable to the unskilled labour during the operation of the contract and the case of the plaintiffs is that the revision by the State Government was far more in excess of the rise in the cost of living index and this additional burden, though partly compensated by Clause 13.6, has to be fully borne by the defendants and since the defendants have not accepted the demand of the plaintiffs to pay to the plaintiffs on the basis of revised minimum wages, the dispute has arisen.

12. Clause 63 of the General Conditions of the

Contract is very relevant which reads thus:

> "63. Matters finally determined by the Railway.
>
> . All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the Railway and the Railway shall within a reasonable time after receipt of the Contractor's presentation make the notify decisions on all matters referred to by the contractor in writing, provided that matters for which provision has been made in Clauses 18, 22(5), 39, 45(a), 55, 55-A, 60(2) and 61(1)(xiii)(B)(c)(b) of the General Conditions of Contract or in any clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' and decisions thereon shall be final and binding on the contractor; provided further that 'excepted matters' shall specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration."

13. What is provided by Clause 63 is that all disputes and differences of any kind and nature whatsoever between the parties in connection with the contract shall be referred by the contractor (plaintiffs) to the Railway (defendants) and that the Railway shall, within a reasonable time after receipt of the contractor's presentation, make decision and notify the same to the contractor in writing. It further provides that the matters provided in clauses 18, 22(5),

39, 45(a), 55, 55-A(5), 60(2) and 61(1)(xiii)(B)(c)(b) of the General Conditions of Contract or any clause of Special Conditions of the Contract shall be treated as "excepted matters" and decision thereon shall be final and binding on the contractor. It further provides that excepted matters shall stand specifically excluded from the purview of the arbitration clause and shall not be referred to arbitration. The question, therefore, that arises for our determination is - whether the claim made by the plaintiffs falls in the category of 'excepted matters'. If the answer is in the affirmative, obviously such matter is outside the purview of the arbitration clause and shall not be referred to arbitration. Having seen clauses 13.6, 13.7 and additional Special Condition of Work - Clause 9, no doubt is left in our mind that the controversy raised by the plaintiffs concerning the revised payment of minimum wages to unskilled labour is covered by the clauses of the Special Conditions of the Contract. Clause 13.6 and so also Clause 9 are the clauses of special conditions of the Contract. As a matter of fact, the title itself suggests that these are special conditions of work. On 25th December, 1985, the plaintiffs wrote to the concerned authority of the defendants that they were eligible for compensation for increase in labour cost on account of abnormal increase in minimum wages and,

accordingly, put up the claim of Rs.23,47,125/- towards that head for the additional expenses incurred upto 31st October, 1985. However, this claim of the plaintiffs was rejected by the defendants and vide letter dated 19th May, 1986, the plaintiffs were communicated that the Railways (Defendants) were not liable to make any extra payment towards variation of the prices of labour excepting as provided for in Clause 13.6 of the additional Special Conditions of Work Part "B" of the Contract. This decision is final and binding upon the contractor; the claim made by the plaintiffs falls in the category of excepted matters and not amenable to arbitration clause provided in Clause 63.

14. As a matter of fact the controversy that has been referred by the learned single Judge to us is wholly and squarely concluded now by the judgment of the Supreme Court in the case of **General Manager, Northern Railway & Anr. Vs. Sarvesh Chopra, (2002) 4 SCC 45.** That was a case wherein the Court was concerned with Clause 63 of the Conditions of Contract with which we are concerned and some Special Conditions of Contract viz. Clauses 9.2, 11.3 and 21.5 as were obtaining in the contract. This is what the Supreme Court said with reference to Clause 63 of the General Conditions of the Contract.

"7. A bare reading of clause 63 shows that it consists of three parts. Firstly, it is an arbitration agreement requiring all disputes and differences of any kind whatsoever arising out of or in connection with the contract to be referred for adjudication by arbitration, by the Railways, on a demand being made by the contractor through a representation in that regard. Secondly, this agreement is qualified by a proviso which deals with "excepted matters". "Excepted matters" are divided into two categories: (i) matters for which provision has been made in specified clauses of the General Conditions, and (ii) matters covered by any clauses of the Special Conditions of the contract. Thirdly, the third part of the clause is a further proviso, having an overriding effect on the earlier parts of the clause, that all "excepted matters" shall stand specifically excluded from the purview of the arbitration clause and hence shall not be referred to arbitration. The source of controversy is the expression: "matters for which provision has been made in any of the clauses of the Special Conditions of the contract shall be deemed as "excepted matters" and decisions thereon shall be final and binding on the contractor". It is submitted by the learned counsel for the respondent that to qualify as "excepted matters" not only the relevant clause must find mention in that part of the contract which deals with Special Conditions but should also provide for a decision by an authority of the Railways by way of an "inhouse remedy", which decision shall be final and binding on the contractor. In other words, if a matter is covered by any of the clauses in the Special Conditions of the contract but no remedy is provided by way of decision by an authority of the Railways then that matter shall not be an "excepted matter". The learned counsel supported his submission by reading out a few clauses of the General Conditions and Special Conditions. For example, vide clause 18 of the General Conditions any question or

> dispute as to the commission of any offence or compensation payable to the Railways shall be settled by the General Manager of the Railways in such manner as he shall consider fit and sufficient and his decision shall be final and conclusive. Vide clause 2.4.2(b) of the Special Conditions, a claim for compensation arising on account of dissolution of a contractor's firm is to be decided by the Chief Engineer (Construction) of the Railways and his decision in the matter shall be final and binding on the contractor. Vide clause 12.1.2 of the Special Conditions, a dispute whether the cement stored in the godown of the contractor is fit for the work, is to be decided by the Engineer of the Railways and his decision shall be final and binding on the contractor. The learned counsel submitted that so long as the remedy of decision by someone though he may be an authority of the Railways is not provided for, the contractor's claim cannot be left in the lurch by including the same in "excepted matters". We find it difficult to agree."

15. With regard to the Petition under Section 20 of the Arbitration Act, 1940, in paragraph 17 of the report the Supreme Court summed up its conclusions thus:

> "17. To sum up, our conclusions are: (i) while deciding a petition under Section 20 of the Arbitration Act, 1940, the court is obliged to examine whether a difference which is sought to be referred to arbitration is one to which the arbitration agreement applies. If it is a matter excepted from the arbitration agreement, the court shall be justified in withholding the reference, (ii) to be an excepted matter it is not necessary that a departmental or an "in-house" remedy for settlement of claim must be provided by the contract. Merely for the absence of provision for in-house settlement of the claim, the claim does not cease to be an

> excepted matter, and (iii) an issue as to arbitrability of claim is available for determination at all the three stages - while making a reference to arbitration, in the course of arbitral proceedings and while making the award a rule of the court."

16. The Supreme Court, thus, has clearly exposited the legal position that while deciding the Petition under Section 20 of the Arbitration Act, 1940, the Court is obliged to examine whether the difference which is sought to be referred to arbitration is one to which the arbitration agreement applies; if it is a matter excepted from the arbitration agreement the Court shall be justified in withholding the reference. This legal position is clearly attracted to the facts of the present case as the controversy raised by the plaintiffs with regard to their claim pertaining to revision of minimum wages by the State Government of the unskilled labour is clearly covered by excepted matters under Clause 63. The pleading and the material placed before the Court does not even remotely suggest that the claim is outside the purview or category of excepted matters and referrable to arbitration.

17. We, thus, hold that the claim of the plaintiffs on account of increase in minimum wages during execution of the works falls in the category of

excepted matters and is not referrable to arbitration for adjudication.

18. Suit is, accordingly, dismissed with no order as to costs.

Sd/-
[R.M. LODHA, J.]

Sd/-
[S.A. BOBDE, J.]